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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 656

MILWAUKEE TOWNE CORPORATION,
A CORPORATION,
Petitioner,

vs.

LOEW'S INCORPORATED, A CORPORATION, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

THOMAS C. MCCONNELL,
Attorney for Petitioner.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
Petition	1
Jurisdiction	2
Opinion Below	2
Summary Statement of the Matter Involved	2
Questions Presented	5
Reasons for Granting the Writ	6
Brief	7
Statement of the Case	7
Jurisdiction	7
Opinion Below	7
Specification of Errors	8
Argument	9
I. The Court of Appeals has exceeded its appellate jurisdiction by rewriting by judicial interpolation an injunction decree which had become final and not subject to review	9
II. The Court of Appeals had no jurisdiction to modify the injunction decree under the guise of construction without a showing of a change in condition unforeseeable at the time the decree was entered	11
Conclusion	13

CITATIONS.

Cases.

Bank of Lewisburg v. Sheffey, 140 U. S. 445..... 10
Conboy v. First National Bank, 203 U. S. 141..... 10
Dickinson v. Petroleum Conversion Corporation, 338 U. S. 507..... 10
Milwaukee Towne Corporation v. Loew's Incorporated, et al., 190 F. 2d 561, cert. den. 342 U. S. 909..... 2, 3
United States v. Paramount Pictures, Inc., et al., 334 U. S. 131.....4, 5, 6, 11, 12
United States v. Swift & Company, 286 U. S. 106.5, 6, 11, 13

Statutes and Miscellaneous.

62 Stat. 929, 28 U. S. C. A. § 1292..... 6
62 Stat. 929, 28 U. S. C. A. § 1291..... 6
68 Stat. 98, 28 U. S. C. A. § 1254 (1)..... 2
Sections 1, 2 and 7 of the Sherman Act, 26 Stat. 209-210 2
Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. A., Sections 1, 2 and 15..... 2
Section 73 (a) Federal Rules of Civil Procedure..... 3, 9

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PETITION FOR A WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Milwaukee Towne Corporation, a corporation, respectfully prays that a writ of certiorari may issue to the United States Court of Appeals for the Seventh Circuit to review its mandate and opinion reversing a non-appealable order of the United States District Court. The District Court order refused to modify an injunction decree entered against Loew's Incorporated, a corporation; Paramount Pictures, Inc., a corporation; RKO Radio Pictures, Inc., a corporation; Twentieth Century-Fox Film Corporation, a corporation; Warner Bros. Pictures Distributing Corporation, a corporation; Warner Bros. Circuit Management Corporation, a corporation; Warner

Bros. Theatres, Inc., a corporation, and Columbia Pictures Corporation, a corporation, respondents, in such manner as to enable respondents to compel petitioner to submit to competitive bidding with respondents' theatres in order to obtain any motion pictures for exhibition in petitioner's Milwaukee Towne Theatre. The District Court had previously refused to enter such a provision in its decree (R. 49) and the Court of Appeals had affirmed such refusal (*Milwaukee Towne Corporation* v. *Loew's Inc., et al.*, 190 F. 2d 561), and a petition to review the injunction decree by certiorari had been refused by this Court (342 U. S. 909).

JURISDICTION.

The jurisdiction of this Court is invoked under 68 Stat. 98, 28 U. S. C. A. § 1254 (1).

The judgment of the Court of Appeals was entered on December 23, 1952.

OPINION BELOW.

The opinion of the Court of Appeals appears in the record at pages 67-77 but is not as yet reported in the Official Reports. The District Court's opinion appears in the record at pages 40-42 and its order appears at pages 48-49 of the record.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner brought this suit under Sections 1, 2 and 7 of the Sherman Act, 26 Stat. 209-210, and Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. A. Sections 1, 2 and 15, for an injunction and to recover treble damages. An award of damages and an injunction entered by the District Court were substantially affirmed by the Court of

Appeals (*Milwaukee Towne Corporation* v. *Loew's Incorporated, et al.*, 190 F. 2d 561) and certiorari was denied by this Court (342 U. S. 909).

The injunction from which the appeal was taken provided among other things the following:

> "V. • • •
>
> (b) preventing plaintiff, in the operation of the Towne Theatre in the City of Milwaukee, Wisconsin, from contracting for or from securing in the course of interstate trade and commerce, at fair and reasonable film rental, any motion picture film or films suitable for first-run exhibition in the City of Milwaukee, Wisconsin, by refusing to offer such picture to plaintiff at such fair and reasonable film rental."

This language was affirmed without modification by the Court of Appeals on September 4, 1951 (190 F. 2d 561) and this Court denied certiorari on January 7, 1952 (342 U. S. 909). The mandate was filed in the District Court on January 14, 1952 and on January 25, 1952 (R. 8) pursuant to such mandate the above quoted language was reentered by the District Court. No notice of appeal was filed thereto within the thirty days required by Rule 73 (a) of the Federal Rules of Civil Procedure.

On March 7, 1952, respondents filed a cross-complaint in which they asked the District Court to construe the decree to provide for competitive bidding (R. 4, 9). This came on to be heard on the cross-complaint and on a motion to dismiss and on the entire record theretofore made in the District Court. The District Court said (R. 41):

> "What the defendants and cross-complainants really want is for this court to say that the Milwaukee Towne Corporation shall be compelled to enter into competitive bidding for films."

The District Court denied the prayer of the cross-complaint, ruling (R. 49):

> "* * * the issues raised in the cross-complaint have already been adjudicated against the contentions of defendants-cross-complainants and in favor of plaintiff-cross-defendant, * * *."

The District Court further held (R. 49) that:

> "Said decretal provision does not contemplate nor does it mean that plaintiff-cross-defendant's Towne Theatre must outbid any other theatre or theatres in order to obtain such film or films for such first run exhibition from said defendant distributors."

On appeal, the Court of Appeals reversed the District Court, holding in effect that in order to obtain any pictures petitioner must outbid respondents' theatres which had already been found to be in a conspiracy to destroy petitioner's exhibition business.

In following this Court's decision in *United States* v. *Paramount Pictures, Inc., et al.*, 334 U. S. 131, 162, the District Court (R. 41) said:

> "I will agree * * * with the Supreme Court * * * that that would be suicidal for the Milwaukee Towne Corporation. That would be suicidal. I haven't any doubt about it."

In referring to this remark by the District Court, the Court of Appeals said:

> "It stated that a requirement of competitive bidding 'would be suicidal for the Milwaukee Towne Corporation.' The argument is speculative; there are no facts upon which it is predicated."

The original record on which the injunction decree was entered and against the background of which the District Court refused to write in a provision for competitive bidding shows the following:

In endeavoring to bid for the Columbia picture "Jolson Sings Again", petitioner found the bidding rigged. The

rejection of its bid came not from Columbia, the distributor of the picture, but from the office of Fox-Wisconsin Theatres, which was petitioner's competitor. This was shown by the envelope enclosing the rejection, which in lieu of postage was stamped with the franking machine of the Fox Company, proving beyond the question of a doubt that the whole matter had been discussed with petitioner's competitor, one of respondents' theatres, the Fox-Wisconsin Amusement Co. (Pls. Ex. 492, O. R. 2891).

In holding that the injunction decree provides that petitioner must outbid respondents' theatre monopoly in exhibition in order to obtain any pictures, the Court of Appeals under the guise of construction has modified a final decree without any showing of an unforeseeable change in condition as required by this Court in the case of *United States* v. *Swift & Company*, 286 U. S. 106; has assumed jurisdiction to rehear an issue decided against respondents' contentions some two years before, and has written into an injunction decree a provision for competitive bidding which does not even contain the safeguards which this Court held essential in the case of *United States* v. *Paramount Pictures, Inc., et al.*, 334 U. S. 131.

QUESTIONS PRESENTED.

(1) Does a Court of Appeals have jurisdiction to construe a decree of injunction not then subject to further appeal in a manner to read into the decree provisions for competitive bidding not contained in the decree itself?

(2) Does a Court of Appeals have jurisdiction to modify an injunction decree under the guise of construction without any change in condition not foreseeable at the time the decree was first entered?

(3) Does a Court of Appeals have jurisdiction to advise as to whether or not contemplated conduct on the part of respondents will or will not violate an injunction decree?

REASONS FOR GRANTING THE WRIT.

The discretionary power of this Court to grant a writ of certiorari is invoked upon the following grounds:

1. The Court of Appeals has assumed jurisdiction to modify a decree under the guise of construction without any showing of a change in condition not foreseeable at the time the decree was entered. This assumption of jurisdiction is in direct conflict with the decision of this Court in the case of *United States* v. *Swift & Company*, 286 U. S. 106.

2. The Court of Appeals has assumed jurisdiction to read into a decree of injunction a provision for competitive bidding in direct conflict with the decision of this Court in the case of *United States* v. *Paramount Pictures, Inc., et al.*, 334 U. S. 131.

3. The Court of Appeals has assumed jurisdiction to review an order not appealable under Federal statutes in that it was not an interlocutory order as defined in 62 Stat. 929; 28 U. S. C. A. § 1292, nor was it a final order within the provisions of 62 Stat. 929; 28 U. S. C. A. § 1291.

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Respondents.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The essential facts of the case are stated in the accompanying petition for a writ of certiorari.

JURISDICTION.

The jurisdiction of this Court is shown in the accompanying petition.

OPINION BELOW.

The opinion of the Court of Appeals is found at pages 67-77 of the record and is as yet unreported.

SPECIFICATION OF ERRORS.

If a writ of certiorari is issued, petitioner intends to urge that the Court of Appeals for the Seventh Circuit erred:

(1) In setting aside the trial court's decision that the original decree in this cause meant, as it said, that petitioner was to be offered pictures at reasonable film rental, and erred in declaring that respondents could in lieu thereof offer the pictures under a system of competitive bidding not mentioned in the decree.

(2) In entertaining jurisdiction to reverse an order of the District Court which was not appealable under any Federal statute.

ARGUMENT.

I.

THE COURT OF APPEALS HAS EXCEEDED ITS APPELLATE JURISDICTION BY REWRITING BY JUDICIAL INTERPOLATION AN INJUNCTION DECREE WHICH HAD BECOME FINAL AND NOT SUBJECT TO REVIEW.

The injunction decree provided in Section V(b) that the pictures were to be offered by respondents to petitioner "at fair and reasonable film rental" (R. 6). This decretal order became final January 25, 1952, after the Court of Appeals had affirmed it and it was reentered on that date pursuant to the mandate of the Court of Appeals. If the decree as entered was not in accord with the mandate of the Court of Appeals, the decree was subject to further appeal, but the time for such appeal has long since expired.

See:

Rule 73(a) Federal Rules of Civil Procedure.

The so-called cross-claim was filed after the time for appealing from the reentered decree had expired; namely, on March 7, 1952. The cross-claim sought a rehearing of the injunction decree under the guise of construction by having the decree construed in a manner as to require petitioner to outbid all other theatres, including respondents' theatres, in order to obtain the pictures.

In the original case, respondents' theatres and respondents had been found guilty of conspiring to monopolize first run exhibition and to preclude petitioner from obtaining any first run pictures for its Milwaukee Towne Theatre (O. R. 3328-9, 3332).

When the instant matter came on for hearing in the District Court, it was heard on the cross-claim and on the

original record as made, and the District Court (R. 41) said:

> "What the defendants and cross-complainants really want is for this court to say that the Milwaukee Towne Corporation shall be compelled to enter into competitive bidding for films."

After the hearing the District Court (R. 49), found:

> "(2) That the issues raised in the cross-complaint have already been adjudicated against the contentions of defendants-cross-complainants and in favor of plaintiff-cross-defendant, and said adjudication constitutes the law of this case and cannot be readjudicated on the issues raised in said cross-complaint."

The denial of a rehearing on an issue once decided does not vest a United States Court of Appeals with any appellate jurisdiction.

See:

Conboy v. *First National Bank*, 203 U. S. 141.
Bank of Lewisburg v. *Sheffey*, 140 U. S. 445.

Further, since the injunction decree entered pursuant to the mandate of the Court of Appeals was not appealed from within the time permitted by the statute, the Court of Appeals had no jurisdiction to change the decree on an appeal from the instant order.

See:

Dickinson v. *Petroleum Conversion Corporation*, 338 U. S. 507.

It thus appears that the Court of Appeals for the Seventh Circuit has exceeded its jurisdiction by changing the provisions of an injunction decree which had become final and non-appealable because the time to appeal therefrom had long since expired.

II.

THE COURT OF APPEALS HAD NO JURISDICTION TO MODIFY THE INJUNCTION DECREE UNDER THE GUISE OF CONSTRUCTION WITHOUT A SHOWING OF A CHANGE IN CONDITION UNFORESEEABLE AT THE TIME THE DECREE WAS ENTERED.

The District Court held (R. 41) that the decree as it now reads had been affirmed by the Court of Appeals and ruled (R. 49) that "said decretal provision does not contemplate nor does it mean that plaintiff-cross-defendant's Towne Theatre must outbid any other theatre or theatres in order to obtain such film or films for such first-run exhibition from said defendant distributors."

In the case of *United States* v. *Swift & Company,* 286 U. S. 106, 119, this Court said that:

> "The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making."

In the instant case there was no showing or even any allegation that there was any change in the conditions that existed at the time the instant decree was entered. At that time this Court had dealt with so-called competitive bidding in the case of *United States* v. *Paramount Pictures, Inc., et al.,* 334 U. S. 131, 162-3, and had the following to say about competitive bidding:

> "At first blush there is much to commend the system of competitive bidding. The trade victims of this conspiracy have in large measure been the small independent operators. They are the ones that have felt most keenly the discriminatory practices and predatory activities in which defendants have freely indulged. They have been the victims of the massed purchasing power of the larger units in the industry. It is largely out of the ruins of the small operators that the large empires of exhibitors have been built. Thus it would appear to be a great boon to them to

substitute open bidding for the private deals and favors on which the large operators have thrived. But after reflection we have concluded that competitive bidding involves the judiciary so deeply in the daily operation of this nationwide business and promises such dubious benefits that it should not be undertaken.

* * * * *

"Columbia puts these pertinent queries: 'No two exhibitors are likely to make the same bid as to dates, clearance, method of fixing rental, etc. May bids containing such diverse factors be readily compared? May a flat rental bid be compared with a percentage bid? May the value of any percentage bid be determined unless the admission price is fixed by the license?'

"The question as to who is the highest bidder involves the use of standards incapable of precise definition because the bids being compared contain different ingredients. Determining who is the most responsible bidder likewise cannot be reduced to a formula. The distributor's judgment of the character and integrity of a particular exhibitor might result in acceptance of a lower bid than others offered. Yet to prove that favoritism was shown would be well nigh impossible, unless perhaps all the exhibitors in the country were given classifications of responsibility. If, indeed, the choice between bidders is not to be entrusted to the uncontrolled discretion of the distributors, some effort to standarize the factors involved in determining 'a reasonable return to the licensor' would seem necessary."

The District Court in disposing of the instant case said (R. 41) that he agreed with this Court that an attempt by an independent theatre to outbid a monopoly or conspiracy of distributors would be suicidal. As we have already pointed out in our summary statement of the matter involved, the District Court had first-hand knowledge of the working of such a system in the hands of these dis-

tributors and that it was perfectly apparent that any bid made by petitioner would be taken to a co-conspirator to be matched or bettered and in this manner respondents would be enabled to carry out their project to exclude petitioner from first run films.

Since there was no appeal from the decretal provision entered pursuant to the mandate of the Court of Appeals within the time permitted by the statute, no appeal would lie from the further order entered on the cross-complaint unless such order could be construed to be a refusal to modify an injunction. If the order of the District Court is so construed, then the Court of Appeals has refused to follow this Court's decision in the case of *United States* v. *Swift & Company* by changing or modifying a decree without any showing in the record of any change in conditions from those existing at the time the decree was entered.

It is self-evident that the Court of Appeals has created for itself a new jurisdiction to modify a final injunction decree by writing something into it which admittedly is not there, in complete contravention of the Federal statutes having to do with appellate jurisdiction.

CONCLUSION.

The decision of the Court of Appeals in effect attempts to modify an injunction decree which had long since become final and not appealable without any showing of a change in conditions as required by the decision of this Court in the case of *United States* v. *Swift & Company*, 286 U. S. 106. No other basis for jurisdiction by a Court of Appeals exists because the original decree had long since become final and not subject to further appellate court review.

For the reasons given here, we submit that questions of

large public importance in the administration of the anti-trust laws and concerning the jurisdiction of a Court of Appeals to modify and change a final decree are presented and that therefore this Court's writ of certiorari should issue to the Court of Appeals for the Seventh Circuit to review its decision in the instant case.

Respectfully submitted,

THOMAS C. MCCONNELL,
Attorney for Petitioner.

16

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
Citation of Opinion Below	1
Jurisdiction	1
Statement of Facts	1
Argument	5

Table of Cases.

Blossom v. Railroad Company, 68 U. S. (1 Wall.) 655, 657	6
Farmers' Loan and Trust Co., 129 U. S. 206, 213	6
McComb v. Jacksonville Paper Co., 336 U. S. 187, 192	5
Milwaukee Towne Corp v. Loew's Inc., 190 F. 2d 561, 571	3
Minnesota Co. v. St. Paul Co., 69 U. S. (2 Wall.) 609, 632	5
Regal Knitwear Co. v. Labor Board, 324 U. S. 9, 15	5
United States v. Paramount Pictures (distinguished), 334 U. S. 131, 162	6
United States v. Paramount, et al., CCH Trade Cases, 1948-1949, ¶ 62,377; id., 1950-1951, ¶ 62,573, ¶ 62,765, ¶ 62,861; id., 1952, ¶ 67,228	7
Utah Const. Co. v. Salmon River Canal Co., 85 F. 2d 769, 771, cert. den. 300 U. S. 663	6

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OPINION BELOW.

The opinion of the Court of Appeals is reported at 201 F. 2d 19, advance sheets March 2, 1953.

JURISDICTION.

The jurisdiction of this Court is invoked by petitioner under 62 Stat. 928, 28 U. S. C. § 1254(1). The judgment of the Court of Appeals was entered on December 23, 1952 (R. 78).

STATEMENT OF FACTS.

The grounds asserted by the petitioner for granting a writ of certiorari rest upon distortion and concealment of

the record. The petition and supporting brief claim that the judgment sought to be reviewed was a modification by construction of the original decree in this case, and that such decree had been affirmed on an earlier appeal. The fact is that the decree was modified on the earlier appeal and the judgment sought to be reviewed now merely corrected an attempt by the trial court, after the first appeal, to disregard the Court of Appeals' modification of the decree.

On April 14, 1950, the District Court entered a decree which, among other things, enjoined the respondents from:

> "V. * * *
>
> "(b) preventing plaintiff, in the operation of the Towne Theatre in the City of Milwaukee, Wisconsin, from contracting for or from securing in the course of interstate trade and commerce, at fair and reasonable film rental, any motion picture film or films suitable for first run exhibition in the City of Milwaukee, Wisconsin, by refusing to offer such picture to plaintiff at such fair and reasonable film rental. *A refusal on the part of plaintiff to accept such offer or to play a picture on the contracted playdate shall not prevent defendants from contracting with any other exhibitor for a first run showing of the same;*"* (R. 6).

On the first appeal, the Court of Appeals modified the decree by striking out the italicized words. It said that the italicized words had the effect of giving to the petitioner an option to exhibit on exclusive first-run in Milwaukee any picture distributed by each of the respondents and of relegating the petitioner's competitors to the position of being able to license for first-run exhibition in Milwaukee only pictures which the petitioner had rejected. It further said,

> "* * * plaintiff is entitled to a decree which will place it only in the same competitive position which it would have occupied absent a conspiracy. The

* "First run" is defined by the decree as an exclusive first exhibition in the City of Milwaukee.

plaintiff has no right to the award of a position superior to that of other competitors." *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 190 F. 2d 561, 571.

Notwithstanding the modification of the decree by the Court of Appeals on the first appeal, petitioner took the position that it could not be required to compete with any other exhibitors for first-run licenses. It threatened to cite for contempt any of the respondents which failed to license it non-competitively for exclusive first-run any picture which it demanded (R. 9). At the same time, one of the petitioner's competitors, an exhibitor not affiliated with any of the respondents, demanded that it be given an equal opportunity to compete against petitioner (R. 9). Manifestly, it would have been impossible for any respondent to accord to the petitioner the prior exclusive rights which it demanded and also to accord to the petitioner's competitor an equal opportunity to license first-run pictures.

The respondents thereupon filed a cross-complaint in the District Court for a construction of the decree. The relief asked was in the nature of a declaratory judgment that the decree as modified by the Court of Appeals required the respondents to give the petitioner an equal opportunity to compete for first-run pictures, that and no more. (R. 5-11.)

The petitioner moved to strike the respondents' cross-complaint (R. 12). After a hearing, the District Court entered an order whereby, notwithstanding the modification of paragraph V(b) by the Court of Appeals, it construed that paragraph to mean that the petitioner could not be required to compete against anyone in order to obtain the exclusive first run licenses it demanded (R. 48, 49).

It was in that posture that the Court of Appeals took the case for the second time, reversed the District Court's

judgment and confirmed by its opinion that by its prior opinion and modification of the decree on the first appeal it had intended to make it perfectly clear that the petitioner was not entitled to any immunity from competition.

Completely distorting the above facts, the petitioner would have this Court believe that the Court of Appeals on the first appeal affirmed the decree without modification and concurred with the District Court's view that the petitioner should be protected by the decree from the competition of other exhibitors.

By thus misstating the first decision of the Court of Appeals, the petitioner would have the Court believe that the District Court had no jurisdiction over the respondents' subsequent cross-complaint, because the respondents merely were seeking a "rehearing" of an issue theretofore finally adjudicated against them. From this it is claimed to follow that the judgment entered by the District Court on the respondents' cross-complaint, whereby the decree was construed to mean that the petitioner did not have to compete against anyone, was not a final or appealable order.

Finally, the petitioner would have the Court believe that when, on the respondents' appeal from the District Court's construction of the decree, the Court of Appeals reversed the District Court, holding that the petitioner is not protected from competition under the decree, it "modified" the original decree at a time when it had lost appellate jurisdiction thereof and no change of conditions warranting a modification had been shown.

On the true facts, there is no substance to any of the petitioner's asserted reasons for granting a writ of certiorari.

ARGUMENT.

In the decision sought to be reviewed, the Court of Appeals did not modify the decree, either actually or by construction, as the petitioner contends. It already had modified the decree on the first appeal and it entertained the second appeal because the District Court thereafter had placed a construction on the decree which was wholly inconsistent with such modification.

The Court of Appeals did not read into the decree any provision for competitive bidding. It merely held that the decree, as previously modified, contemplated that the petitioner would compete with other exhibitors and required only that in such competition, whether it might take the form of competitive bidding or some other form, the petitioner be "afforded every opportunity, right and privilege accorded a competitor, that and no more." (R. 77; 201 F. 2d at page 25.)

The cross-complaint which the respondents filed in the District Court for a construction of the decree was not an effort on their part to obtain a rehearing of issues theretofore decided against them. Instead, it was a proper application for an order in the nature of a declaratory judgment, based squarely upon the previous holding of the Court of Appeals and made necessary by the threats of the petitioner.

The respondents were not obliged to wait until the petitioner cited them for contempt in order to obtain a binding construction of the decree. Indeed, had they done so, they would have been subject to criticism. *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187 (1949) at 192. *Regal Knitwear Co.* v. *Labor Board,* 324 U. S. 9 (1945) at 15. *Minnesota Co.* v. *St. Paul Co.*, 69 U. S. (2 Wall.) 609 (1864) at 632-634.

The order of the District Court construing the decree was final and appealable. When, after a decree which disposes of a principal subject of litigation, there arise important matters making necessary orders and decrees in which the material rights of the parties are affected, a final adjudication with respect to such rights is appealable. *Blossom* v. *Railroad Company*, 68 U. S. (1 Wall.) 655 (1863) at 657. *Farmers' Loan and Trust Co.*, 129 U. S. 206 (1889) at 213. *Utah Const. Co.* v. *Salmon River Canal Co.*, 85 F. 2d 769 (C. A. 9th Cir., 1936) at 771; cert. den. 300 U. S. 663.

The petition injects into the asserted reasons for granting a writ of certiorari a suggestion that the Court of Appeals, in concluding that the decree in this case does not immunize the petitioner from competition, created a conflict with the decision of this Court in *United States* v. *Paramount Pictures*, 334 U. S. 131 (1948) at 162-165. The suggestion clearly is without merit. There is no disharmony between the two cases.

In the *Paramount* case this Court held that a decree in a suit by the United States should not include a provision for mandatory competitive bidding on a nationwide scale, since the Court believed that under some circumstances competitive bidding could be abused so as to produce results not intended by the trial court in that case. This Court, however, said nothing in the *Paramount* case to indicate that competition in film licensing is improper or that competitive bidding is not a form which such competition properly may assume where it provides a fair solution to a competitive problem.

The Court of Appeals in this case merely held that the decree as modified contemplates that there shall be competition and does not specify the form which such competition shall take. That court was not asked to and it did

not hold that competition under this decree was to be limited to competitive bidding or to any other required form.

The Court of Appeals, however, recognized that the construction of the decree contended for by the petitioner would conflict with *United States* v. *Paramount*. In the latter case final decrees were entered, after remand of the case by this Court, which enjoined the defendants there from licensing any picture otherwise than "solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres *or others*"* (italics supplied). The exclusive, prior and non-competitive playing position demanded by the petitioner under the decree in this case would have compelled the respondent distributors to discriminate in the petitioner's favor against all other exhibitors in Milwaukee.

For the foregoing reasons, no valid ground for granting a writ of certiorari has been advanced.

There is an additional reason why the Court should not take this case. The modification of the decree by which the petitioner lost its claimed right to immunity from competition was accomplished on the first appeal. That decision no longer is subject to review. By the decision now sought to be reviewed the Court of Appeals simply reaffirmed its former decision and set aside a conflicting construction of the decree by the District Court. The second decision of the Court of Appeals could not be reversed to any effect without setting aside its first decision also, and to bring that decision up for review at this late date is beyond the power of the petitioner.

The petitioner evidently realizes that the modification of the decree on the first appeal leaves it without a leg to stand on now. The petition is a bold attempt to ignore the

* CCH Trade Cases, 1948-1949, ¶ 62,377; id., 1950-1951, ¶ 62,573, ¶ 62,765, ¶ 62,861; id., 1952, ¶ 67,228.

result of the first appeal and thereby to deceive the Court into granting a writ of certiorari on asserted grounds which, without such deception, patently are devoid of merit.

CONCLUSION.

The respondents respectfully pray that the petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review the judgment of that court entered December 23, 1952, be denied.

Respectfully submitted,

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17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 656

MILWAUKEE TOWNE CORPORATION,
A CORPORATION,
Petitioner,

vs.

LOEW'S INCORPORATED, A CORPORATION, ET AL.,
Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

THOMAS C. MCCONNELL,
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The only reply that respondents can make to the petition for certiorari is to argue, contrary to the facts, that the District Court had disregarded a modification of the injunction decree made by the Court of Appeals on the first appeal. The record is conclusively opposed to respondents' contention on this issue.

Thus, on April 14, 1950, the District Court entered a decree which, among other things, enjoined respondents from "* * * preventing plaintiff, in the operation of the Towne Theatre in the City of Milwaukee, Wisconsin, from contracting for or from securing in the course of interstate trade and commerce, *at fair and reasonable film rental,*

any motion picture film or films suitable for first run exhibition in the City of Milwaukee, Wisconsin, by refusing to offer such picture to plaintiff at such fair and reasonable film rental * * *". (R. 6) (Italics ours).

On appeal, the Court of Appeals refused to strike out this language from the decree, saying (190 F. 2d 561, 573):

> "The decree is modified in accordance with the views heretofore expressed and, as so modified, is affirmed."

On remand the District Court on January 14, 1952, reentered the above quoted words as Section V(b) of the decree (R. 13, 40-41). No appeal was taken from such reentered decree. The time for any such appeal had long since expired when the present proceeding was originated by a petition filed on March 7, 1952, in the District Court. That petition asked that the injunction decree be construed to compel competitive bidding by petitioner against respondents' theatres. The District Court said (R. 41):

> "What the defendants and cross-complainants really want is for this court to say that the Milwaukee Towne Corporation shall be compelled to enter into competitive bidding for films."

The trial court ruled (R. 49):

> "That the issues raised in the cross-complaint have already been adjudicated against the contentions of defendants-cross-complainants and in favor of plaintiff-cross-defendant, and said adjudication constitutes the law of this case and cannot be readjudicated on the issues raised in said cross-complaint."

It is quite obvious, therefore, that the Court of Appeals had no jurisdiction to entertain appellate jurisdiction to modify the decree under the guise of construction. It is equally apparent that the Court of Appeals did not eliminate the quoted language of the decree on the first appeal. This language, which was contained in Section V(b) of the decree which had been affirmed by the Court of Appeals,

was held by the District Court (R. 49) to mean "just what the words say."

The argument now advanced that all petitioner is entitled to is such motion picture showings as it can bid away from a vicious monopoly, found by the courts below to have been designed by respondents in order to destroy petitioner, was the very issue decided against respondents' contentions on the previous hearings, and it is respectfully submitted therefore that the Court of Appeals had no jurisdiction to readjudicate and modify the terms of the instant injunction decree.

Conclusion.

For the reasons given in the petition and here, it is respectfully urged that the writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit entered December 23, 1952.

Respectfully submitted,

THOMAS C. MCCONNELL,
Attorney for Petitioner.

18

MOTION FILED APR 13 1953

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MILWAUKEE TOWNE CORPORATION, A CORPORATION,
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vs.

LOEW'S INCORPORATED, A CORPORATION, ET AL.,
Respondents.

MOTION OF ALLIED STATES ASSOCIATION OF MOTION PICTURE EXHIBITORS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

ABRAM F. MYERS,
Attorney for Allied States Association of Motion Picture Exhibitors.

THE BLAKEMORE-WARREN PRINTING COMPANY, CHICAGO

INDEX.

PAGE

Motion for Leave to File Brief as Amicus Curiae..... 1

Nature of Applicant's Interest..... 1

Questions of Law Not Presented by Petition..... 2

Relevancy to Dispositions of the Case of Questions Presented..... 3

Brief of Amicus Curiae..... 7

Statement of the Case..... 7

Jurisdiction..... 7

Opinion Below..... 7

Specification of Errors..... 8

Argument..... 9

I. The Court of Appeals Erred in Holding the Existence of an Injunctive Decree Obtained by the Department of Justice Precludes an Injured Person from Obtaining and Maintaining Effective Injunctive Relief as Provided by Statute..... 9

II. A Showing That the Dangers Necessitating the Injunction No Longer Exist Is Requisite to Modification to an Injunctive Decree..... 11

III. The Court of Appeals Erred in Granting the Conspirators the Power to Compel the Milwaukee Towne Theatre to Bid for the Product Held by Their Monopoly..... 14

Conclusion..... 15

CITATIONS.

Cases.

Bigelow v. RKO Radio Pictures, Inc., 327 U. S. 251... 13
U. S. v. Crescent Amusement Co., 323 U. S. 173..... 13
U. S. v. Paramount Famous Lasky Corp., 282 U. S. 30, aff'g 34 F. 2d 984..... 13
U. S. v. Paramount Pictures, Inc., 334 U. S. 131..... .....4, 5, 6, 10, 12, 13, 14, 15
U. S. v. Paramount Pictures, Inc., 70 F. Supp. 53..... 10
U. S. v. Swift & Co., 286 U. S. 106.....5, 10, 11
Youngelaus v. Omaha Film Board of Trade, 60 F. 2d 538..... 12

Statutes.

Section 16 of the Clayton Act, 38 Stat. 737, 15 U. S. C. A. § 26..... 3, 9

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MOTION OF ALLIED STATES ASSOCIATION OF MOTION PICTURE EXHIBITORS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Allied States Association of Motion Picture Exhibitors, respectfully prays that it be granted leave to file a brief as *amicus curiae* in support of the Petition for a Writ of Certiorari filed in this cause and in accord with the Rule 27, par. 9(b, c) of this Court makes the following showing in support thereof:

NATURE OF APPLICANT'S INTEREST.

Allied States Association of Motion Picture Exhibitors is a national association of independent theatre owners and operators. The Association is empowered by its by-laws to speak for all of its members. The Board of

Directors of the Association has adopted a resolution authorizing this petition for leave to intervene in this cause as *amicus curiae*.

Many of the members of Allied are located in and around the City of Milwaukee, Wisconsin, and are directly affected by the construction, force and effect of the injunctive decree entered in this case. All of the members of Allied in the entire United States will be affected by the compulsory bidding systems which will be forced upon them by virtue of the precedent established by the opinion of the Court of Appeals in this case. The defendant distributors of motion pictures in this case control approximately ninety per cent of the first run motion pictures available for exhibition in the United States. The manner in which these distributors conduct their business affects every independent theatre owner and operator because they must lease motion picture film from these distributors or go out of business.

Many of Allied's members are presently engaged in litigation in various parts of the United States against these same distributors seeking injunctive relief from threatened injury resulting from conspiracies between these distributors. Whether or not they will be able to obtain and maintain effective injunctive relief will in great part depend upon the correction by this Court of the errors in the holding of the Court of Appeals for the Seventh Circuit in this case.

QUESTIONS OF LAW THAT HAVE NOT BEEN PRESENTED BY THE PETITION FOR A WRIT OF CERTIORARI.

1. Does the existence of an injunctive decree obtained by the Department of Justice preclude an injured person from obtaining and maintaining effective injunctive relief against threatened or damage resulting from a violation of the anti-trust laws?

2. Does the Court of Appeals have jurisdiction to modify an injunctive decree without determining whether the dangers once substantial have become attenuated to a mere shadow?

3. The Court of Appeals erred in modifying the decree to grant the conspirators with monopoly control over motion picture film untrammelled power to institute a system of compulsory bidding.

RELEVANCY TO THE DISPOSITION OF THE CASE OF THE QUESTIONS OF LAW PRESENTED.

The Court of Appeals in its opinion, 201 F. 2d 19, modified the decree in this case to compel the Milwaukee Towne Theatre to engage in competitive bidding to be conducted by the defendants without any supervision whatsoever. The Court cited the existence of the decrees in the *Paramount* case as its main ground for abrogating the effective relief plaintiff had originally obtained in this case. The injunctive relief which Section 16 of the Clayton Act, 38 Stat. 737, 15 U. S. C. A. § 26 provides to protect persons threatened by injury resulting from violations of the anti-trust laws is not conditioned upon the absence of an injunctive decree in an action by the Department of Justice for similar violations of the anti-trust laws by the same defendants. Neither does that section provide for the abatement of an effective injunctive decree because another court has held the same defendants guilty of similar wrongdoing and also enjoined its continuance.

The Court of Appeals has deprived the Milwaukee Towne Corporation of its right to obtain by contempt proceedings in this case monetary redress for wrongs which may result from rigged bidding, favoritism or collusive operation of the bidding system by holding no supervision of the system should be established in this case. The *Paramount*

decrees are the basis for this holding. However, the *Paramount* decrees by their terms preclude intervention by non-parties and specifically state that they may be enforced and violations punished only by applications to the Court by the parties to that case. Under the holding of the Court of Appeals the Milwaukee Towne Corporation and other independent exhibitors must pursue the indirect route of convincing someone in the Department of Justice that rigged bidding or favoritism has resulted in discrimination in violation of the *Paramount* decrees and persuade them to apply to the Court to punish the violation. As this Court said in the *Paramount* case, 334 U. S. 131, 163, it is well nigh impossible to prove collusive handling of a bidding system. The court in the *Paramount* case would be sitting constantly as referee in the daily operation of the motion picture industry throughout the entire United States which is neither possible nor desirable, and this Court has so held.

In response to the distributor's urging the Court of Appeals has converted the *Paramount* decrees from a shield for the independent exhibitors into a sword which the defendants will use, as in this case, to defeat any attempts of independent exhibitors to obtain and maintain effective injunctive protection. By pitting one court against the other the defendants make a mockery of the prolonged litigation to end their conspiracy.

The record in this case is devoid of any showing that the dangers of recurring violations of the anti-trust laws so substantial as to require injunctive protection have become attenuated to mere shadows. The defendants in this case were found to have conspired against all independent theatres in Milwaukee for over twenty years and as observed by this Court in the *Paramount* case they have shown a marked proclivity for wrongful conduct.

Not only did the Court of Appeals err in modifying the decree without the showing of changed conditions required by *U. S.* v. *Swift & Co.*, 286 U. S. 106, but it erred further in establishing compulsory competitive bidding in direct contravention of this Court's holding in *U. S.* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 161-165, rejecting compulsory bidding as of no value as a method of protection for independent theater owners.

The record in this case demonstrates conclusively that the motion picture films distributed by the defendants is essential to the operation of a motion picture theatre. There is no other source of supply to which independent theatre owners may turn for this basic raw material of their business.

Aside from the vast theatre holdings the distributors managed to achieve by virtue of their conspiracy, there was a further motivating benefit to the distributors. By regulating the flow of pictures and staggering their release at fixed high admission prices, each distributor obtained higher film rentals for its pictures than it could have in a free and open market where they competed with one another. By its opinion, the Court of Appeals has vested in this monopoly the power, with no provision for supervision, to renew their collusive activity with a guarantee of greater reward than ever before. The record in this case demonstrates the technique of calling for bids on a picture, rejecting all bids once or twice and thereby raising the price to a point where an independent exhibitor cannot make a profit. By staggering the release of the first run films, the distributors can limit the available films at any time to such a degree that the independent theatres will be forced to bid fantastic prices to get the one or two pictures released at any given time. The distributors have developed a system under the guise of so-called "compe-

tition" for establishing arbitrary and unreasonably high prices for their products which they could not obtain if it were not for their collusive control of motion picture film. As this Court pointed out in the *Paramount* case, the competitive bidding system would give a natural advantage to the larger and financially stronger exhibitors, such as Fox and Warner, built by the conspiracy in the City of Milwaukee.

It is submitted that these aspects of the decision of the Court of Appeals which vitally affect the entire motion picture industry and the force and effectiveness of this Court's opinion in *U. S.* v. *Paramount Pictures, Inc.*, 334 U. S. 131, should be considered on this Petition for a Writ of Certiorari.

Respectfully submitted,

ABRAM F. MYERS,
Attorney for Allied States Association of Motion Picture Exhibitors.

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MILWAUKEE TOWNE CORPORATION, A CORPORATION,
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Respondents.

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The essential facts of the case are stated in the Petition for a Writ of Certiorari filed herein.

JURISDICTION.

The jurisdiction of this Court is shown in the Petition for a Writ of Certiorari filed herein.

OPINION BELOW.

The opinion of the Court of Appeals is reported as *Loew's Incorporated, et al.* v. *Milwaukee Towne Corporation,* 201 F. 2d 19.

SPECIFICATION OF ERRORS.

Allied States Association of Motion Picture Exhibitors, as *amicus curiae*, urges that the Court of Appeals for the Seventh Circuit erred:

(1) In holding that the existence of the decrees obtained by the Department of Justice in the case of *U. S.* v. *Paramount Pictures, Inc., et al.*, is grounds for denying effective injunctive relief to an injured person.

(2) In modifying an injunctive decree without any evidence in the record to show changes had occurred so that the substantial dangers necessitating the injunction no longer existed.

(3) In modifying the decree to grant the conspirators with monopoly control over motion pictures, untrammelled power to institute a system of compulsory competitive bidding.

ARGUMENT.

I.

THE COURT OF APPEALS ERRED IN HOLDING THE EXISTENCE OF AN INJUNCTIVE DECREE OBTAINED BY THE DEPARTMENT OF JUSTICE PRECLUDES AN INJURED PERSON FROM OBTAINING AND MAINTAINING EFFECTIVE INJUNCTIVE RELIEF AS PROVIDED BY STATUTE.

Section 16 of the Clayton Act, 38 Stat. 737, 15 U. S. C. A. Sect. 26 provides:

> "Any person, firm, corporation or association shall be entitled to sue for and have injunctive relief in any court of the United States having jurisdiction over the parties against threatened loss or damage by a violation of the anti-trust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity."

The injunctive relief granted injured persons against threatened loss or damage by this Section is not limited to situations where the Department of Justice has not sought and obtained an injunction. Neither does it provide that effective protection against further injury achieved by an injunction obtained under this section must be emasculated merely because another court has found the same defendants guilty of similar wrongdoing and enjoined them from continuing.

By its holding in this case, the Court of Appeals for the Seventh Circuit has judicially legislated a curtailment of the scope of the relief provided by Section 16 of the Clayton Act. No showing was made of a change of conditions within the rule for modification of injunctive decrees estab-

lished in *U. S.* v. *Swift & Co.*, 286 U. S. 106. The Paramount decrees enjoining the various defendants had been entered or were in the process of being entered at the time the decree was originally entered in this cause and they cannot constitute a change in conditions unforeseen at the time the decree was entered. The only possible construction of the holding of the Court of Appeals is that a decree in any anti-trust case prosecuted by the Department of Justice precludes an injured person from maintaining effective injunctive relief from the threat of further injury. There is no basis in the law for such a holding.

The decrees in the *Paramount* case preclude the Milwaukee Towne Corporation or any other independent theatre owner or operator from intervening in that case or enforcing that decree. All of the decrees contain the following provision (*U. S.* v. *Paramount Pictures*, 70 F. Supp. 53, 76):

> "Jurisdiction of this cause is retained for the purpose of enabling any of the *parties to the judgment and no others* to apply to the court at any time for such orders or directions as may be necessary or appropriate for the construction, modification or carrying out of the same, for the enforcement of, compliance therewith and for the punishment of violations thereof, or for other or further relief." (Italics supplied.)

It is patently impossible for the Department of Justice and the District Court which has retained jurisdiction of the parties to *U. S.* v. *Paramount Pictures, Inc., et al.* to supervise the day-by-day operation of the motion picture industry throughout the entire United States. As this Court pointed out in the *Paramount* case, 334 U. S. 131, 163, concerning the competitive bidding system it rejected:

> "The system would be apt to require as close a supervision as a continuous receivership unless the de-

> fendants were to be entrusted with vast discretion. The judiciary is unsuited to affairs of business management and control though the power of contempt is crude and clumsy and lacking in the flexibility necessary to make continuous and detailed prosecution effective. Yet delegation of the management of the system to the discretion of those who had the genius to conceive the present conspiracy and to execute it with the subtlety which this record reveals could be done only with the greatest reluctance."

The opinion of the Court of Appeals establishes a limitation on the right to injunctive relief granted by Congress which is completely without foundation in the statute or in general equitable principles. It assigns to the Court in the *Paramount* case duties of supervision with which this Court held it should not be burdened.

II.

A SHOWING THAT THE DANGERS NECESSITATING THE INJUNCTION NO LONGER EXIST IS REQUISITE TO MODIFICATION TO AN INJUNCTIVE DECREE.

No evidence was produced to show any change in conditions from those existing at the time the decree was entered. The Court of Appeals flatly ignored the leading case on the modification of injunctive decrees wherein this Court held, *U. S.* v. *Swift & Co.*, 286 U. S. 106, 119:

> "The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions which existed at its making. We are not at liberty to reverse under the guise of readjustment. Life is never static and the passing of a decade has brought about changes to the grocery business as it has to every other. The inquiry is whether the changes are so important that dangers once substantial have become attenuated to a shadow."

The record in this case shows the defendants were found guilty of conspiring to monopolize first run of motion pictures in the City of Milwaukee and to exclude the Milwaukee Towne Theatre from first run exhibition (O. R. 3328-9, 3332). In 1930, they established the Wisconsin Zoning and Clearance Plan (O. R. 104, 246, 163) and enforced it for over twenty years until enjoined by the decree in this case. These defendants have demonstrated a marked disrespect for the law and the courts which enforce it. They continued their conspiratorial activity long after this court had affirmed the findings of conspiracy in *U. S.* v. *Paramount Pictures, Inc., et al.*, 334 U. S. 131. During the course of the trial of the *Milwaukee Towne* case in the fall of 1949, the conspiracy was still operating as is evidenced by collusive rejection on Plaintiff's bid for a picture distributed by Columbia. The envelope in which the rejection was sent in lieu of postage was stamped with the franking machine of Fox-Wisconsin Amusement Company which operated first run theatres in downtown Milwaukee in competition with Plaintiff (Pls. Ex. 492, O. R. 2891). The conclusion is inescapable that Fox and Columbia had concurred on the disposition of Plaintiff's bid.

The defendants knew as long ago as 1932 when *Youngclaus* v. *Omaha Film Board of Trade*, 60 F. 2d 538 was decided that the system then set up in Milwaukee was condemned by the anti-trust laws (O. R. 2140, 2141). Nevertheless, the defendants went right ahead when they agreed to set up the "Milwaukee Zoning and Clearance Plan" on January 28, 1933 (O. R. 109), a year after the decision in the *Youngclaus* case.

There is nothing in this record to show any abatement of the danger of making circuit deals with the Fox and Warner Theatre companies. The record shows that the

Fox and Warner Theatre companies control all theatres in Milwaukee from first run down to the sixth runs fifty-seven days after the conclusion of first runs except for Plaintiff's theatre and two other independents (Pl. Ex. 207—O. R. 253), as this court pointed out in *U. S.* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 165:

> "But we do not see how, in practical operation the proposed system of competitive bidding is likely to open up to competition the markets which defendants' unlawful restraints have dominated. Rather real danger seems to us to lie in the opportunities the system affords the exhibitor-defendants and the other large operators to strenghten their hold in the industry."

and also 334 U. S. 131, 164 here the court said:

> "Those with the longest purse—the exhibitor-defendants and the large circuits—would seem to stand in a preferred position. If in fact they were enabled through the competitive bidding system to take the cream of the business, eliminate the smaller independents and thus increase their own strategic hold on the industry, they would have the cloak of the court's decree around them for protection."

The decisions of this court in *U. S.* v. *Paramount Famous Lasky Corporation*, 282 U. S. 30, aff'g 34 F. 2d 984; *Interstate Circuit Inc.*, v. *U. S.*, 306 U. S. 208; *U. S.* v. *Crescent Amusement Co.*, 323 U. S. 173; *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251; *U. S.* v. *Paramount Pictures, Inc.*, 334 U. S. 131, stretching over a period of twenty years demonstrate beyond peradventure that a finding that they have violated the anti-trust laws does not deter these conspirators in the slightest. In the *Bigelow* case, this court affirmed the findings that the defendants had conspired to control the Chicago film market and in the face of that decision, the very same companies were found to be conspiring in the same manner in the City of Milwaukee three years later.

Not only is there no evidence in the record of any change in the dangers demonstrated by the record, but the history of the litigation against these same defendants demonstrates conclusively that the threat of further injury to the Milwaukee Towne Theatre and other independent theatres is as great as ever.

III.

THE COURT OF APPEALS ERRED IN GRANTING THE CONSPIRATORS THE POWER TO COMPEL THE MILWAUKEE TOWNE THEATRE TO BID FOR THE PRODUCT HELD BY THEIR MONOPOLY.

The record in this case shows that no theatre can operate in the City of Milwaukee without the product of the defendant distributors (O. R. 409, 412, 413, 415, 430-36). The record also discloses defendants Fox and Warner have a virtual monopoly of the first and subsequent run theatres down to those exhibiting fifty-seven days or later after the close of the first run (Pl. Ex. 207-O R. 2535). By modifying the decree to compel the Milwaukee Towne Theatre to bid against Fox and Warner who were co-conspirators with the defendants, the Court of Appeals has established a system of compulsory competitive bidding which guarantees to Fox and Warner retention of its monopoly on exhibition in the City of Milwaukee (see *U. S.* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 164, 165).

By its holding, the Court of Appeals has condemned the Milwaukee Towne Theatre and other independent theatres in Milwaukee to the mercy of the distributors who conspired against them for over twenty years. They must bid against the Fox and Warner Theatre empires built by the conspiracy. There is no other source to which the Milwaukee Towne Theatre or other independent theatres may turn

to obtain the motion picture film they must have to remain in business. By the modification of the Milwaukee Towne decree, the court has granted the members of this monopoly full control of the bidding system the defendants have established. This weapon is tantamount to the power to destroy the independent competitors of the defendants and such fact was so recognized by this Court in the *Paramount* case, 334 U. S. 131, 631, 161-166.

CONCLUSION.

The decision of the Court of Appeals will affect the entire industry. The Court has so limited the Clayton Act provision for injuctive relief that no injured person may obtain effective protection to the injured business if the Department of Justice has obtained an injunction in a government suit. It has modified the decree without any showing of any kind that the conditions existing at the time the decree was entered have changed in any respect. The result of the modification gives the conspirators the unsupervised power to dispense their monopoly-held product under a compulsory bidding system replete with opportunities for abuse which would be well nigh impossible to prove.

For the reasons given here, we submit the questions raised by this petition are of great public importance to the administration of the anti-trust laws and that therefore this Court's writ of certiorari should issue to the Court of Appeals for the Seventh Circuit to review its decision in the instant case.

Respectfully submitted,

ABRAM F. MYERS,
Attorney for Allied States Association of Motion Picture Exhibitors.

19

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Respondents.

OBJECTION OF RESPONDENTS TO MOTION OF ALLIED STATES ASSOCIATION OF MOTION PICTURE EXHIBITORS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

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OBJECTION OF RESPONDENTS TO MOTION OF ALLIED STATES ASSOCIATION OF MOTION PICTURE EXHIBITORS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

The respondents, for the reasons hereinafter stated, object to the motion of Allied States Association of Motion Picture Exhibitors for leave to file a brief as *amicus curiae* in support of the petition for a writ of certiorari herein.

The would-be *amicus curiae* is grievously misinformed as to what was adjudicated by the judgment of the Court of Appeals sought to be reviewed. In the first place, it asserts that the judgment sought to be reviewed modified the decree in this case. The same misstatement is found in the petition for a writ of certiorari herein, where it undoubtedly is a deliberate attempt to mislead the Court. It is crystal clear from the record and from the opinion of the Court of Appeals that the original decree was modified in the respect now complained of by the judgment of the Court of Appeals on a previous appeal, no longer open to review. The judgment of the Court of Appeals now sought

to be reviewed merely reaffirmed that modification and set aside as erroneous a conflicting construction of the decree by the District Court.

The opinion below states:

> "The instant controversy involves a basic issue, that is, whether a plaintiff in a civil action predicated upon the anti-trust laws is entitled to injunctive relief which will accord him a preferred status over his competitors. More specifically, the issue is whether such a plaintiff, after recovery of damages sustained as the victim of a conspiracy, is entitled to become the beneficiary and thereby relegate his competitors to an inferior position. *We thought and still think that we decided this issue in our previous opinion.* We stated, 190 F. 2d at page 571:
>
> > 'At the same time, we think that plaintiff is entitled to a decree which will place it only in the same competitive position which it would have occupied absent a conspiracy. The plaintiff has no right to the award of a position superior to that of other competitors.'
>
> In support of that statement we cited Bigelow v. RKO Radio Pictures, Inc., 162 F. 2d 520, 524, wherein this court stated:
>
> > 'The plaintiffs have a right to compete for any playing position, but they have no right to be awarded and protected by decree in any certain position.'
>
> *Applying that principle, we eliminated from Section V(b) the language heretofore shown in italics because we thought it awarded plaintiff a preferred status inasmuch as defendants would not have been permitted to offer their first-run pictures to other exhibitors until they had been refused by the plaintiff.*" (R. 72, 73; 201 F. 2d 19 at p. 23.) (Italics supplied.)

At another point in its opinion the court below said,

> "In summary, *we reiterate our previous holding* that plaintiff is entitled to the same competitive position which it would have occupied absent a conspiracy and

> that it has no right to the award of a position superior to that of its competitors." (R. 76; 201 F. 2d at 25.) (Italics supplied.)

It is difficult to understand how anyone who really had read the opinion below conscientiously could represent to this Court that the Court of Appeals thereby modified the injunction decree.

The would-be *amicus curiae* further asserts, in equal disregard of what actually was held below, that the Court of Appeals by the decision sought to be reviewed established a precedent for "compulsory bidding systems" throughout the entire United States. (Mot., p. 2.) The decree herein, as modified by the Court of Appeals on the prior appeal, says not a word about compulsory competitive bidding. The Court of Appeals has not now construed the decree to require competitive bidding under any circumstances. On the contrary, that court stated specifically in its opinion:

> "Thus, we interpret a 'fair and reasonable film rental' as provided for in Section V(b) of the decree to mean a rental determinable by competition. The decree is silent as to the system or method to be employed in making such determination. To now specify a system or method would require a modification of the decree, which neither the District Court nor this court is called upon to make." (R. 76, 77; 201 F. 2d at 25.)

The would-be *amicus curiae* again is wrong in stating, "The Court cited the existence of the decrees in the *Paramount** case as its main ground for abrogating the effective relief plaintiff had originally obtained in this case." (Mot., p. 3.) The Court of Appeals on the prior appeal, when it modified the original decree of the District Court, did not even mention the *Paramount* case as a reason for the modification. In this proceeding, when it reaffirmed its earlier decision, the Court of Appeals discussed the *Paramount* case only to point out that nothing therein "* * *

* *United States* v. *Paramount Pictures*, 334 U. S. 131.

affords the slightest support for the theory advanced in this case, that plaintiff is entitled to a position superior to that of its competitors." (R. 74, 75; 201 F. 2d at 24.)

The would-be *amicus curiae* makes the further completely erroneous assertion that the opinion below deprived the petitioner of its right to obtain by contempt proceedings in this case relief from injuries which the respondents might inflict on it by abuses of competitive bidding and that petitioner would be obliged to appeal to the Department of Justice if it needed such relief (Mot., pp. 3, 4). The Court of Appeals held no such thing. It rejected a contention of the petitioner that competitive bidding, if permitted under this decree, would require too much supervision on the part of the court. When it said, "* * * the extent of controversies arising between the parties will determine the amount of court supervision required, * * *" it clearly was saying that it accepted the responsibility of supervising when necessary whatever method of competitive selling might be adopted by the respondent distributors (R. 75; 201 F. 2d at 24). Moreover, the Court of Appeals indicated clearly what it would regard as violative of paragraph V(b) of the decree when it said:

> "It devolves upon the defendants, whatever system or method is utilized, to make certain that plaintiff in the procurement of pictures is afforded every opportunity, right and privilege accorded a competitor, that and no more." (R. 77; 201 F. 2d at 25.)

Thus, the rights obtained by the petitioner under this decree neither spring from nor are limited by the decision in the *Paramount* case, although they are in harmony with that decision, and they are fully enforceable in the court which entered the decree in this case.

The would-be *amicus curiae* asserts,

> "The record in this case demonstrates the technique of calling for bids on a picture, rejecting all bids once

> or twice and thereby raising the price to a point where an independent exhibitor cannot make a profit. By staggering the release of the first run films, the distributors can limit the available films at any time to such a degree that the independent theatres will be forced to bid fantastic prices to get the one or two pictures released at any given time. The distributors have developed a system under the guise of so-called 'competition' for establishing arbitrary and unreasonably high prices for their products which they could not obtain if it were not for their collusive control of motion picture film." (Mot., pp. 5, 6.)

The above quoted statements are completely irresponsible. The Court will note that no record citations are given for any of them. None could be given, since the record in this case is absolutely barren of any evidence to support the statements made.

The misstatements which are noted and exposed above are the entire basis of the motion for leave to file a brief as *amicus curiae* herein. The proposed brief which is printed with the motion is based upon the same misconceptions.

The respondents respectfully suggest that Allied has not filed its motion and proposed brief because of anything which has been adjudicated in this case, but that it merely has tried to seize upon this case as an opportunity of voicing the protest of its members against real competition in the motion picture business. For a number of years so-called independent exhibitors, such as comprise the membership of Allied, have been loud champions of competition for forensic purposes, because that pose has unlocked the door to a golden treasure of treble damage claims against the distributors and the theatre companies with them. Outside the courtroom, however, these same exhibitors consistently have displayed marked coolness toward the idea of competition when it directly involves them.

In some other case the members of Allied may be given

an opportunity to advocate their apparent belief that under the antitrust laws they should be protected against competition—that the Federal courts should use the Sherman Act as a means of imposing *quasi* public utility status upon motion picture distributors. This case, however, is not an appropriate forum for such an argument. The decision whereby it became the law of this case that the petitioner is entitled only to be placed in the same competitive position which it would have occupied absent a conspiracy was rendered by the Court of Appeals on July 17, 1951. (R. 6.) Neither the petitioner nor the would-be *amicus curiae* then made any effort to have that question reviewed by this Court, and it is improper to ask this Court to review it now.

The motion for leave to file a brief as *amicus curiae* should be denied.

Respectfully submitted,

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